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No. 502

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In The

Supreme Court of the United States

October Term 1957

American & European Agencies, Inc.,
Petitioner

v.

Whitney Gillilland, Pearl Carter Pace, and Henry J. Clay, constituting the Foreign Claims Settlement Commission of the United States, and George M. Humphrey as Secretary of the Treasury of the United States of America,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMICI CURIAE IN OPPOSITION
(American Yugoslav Electric Company, Inc.; Steven Ausnit; Walter Petschek; Socony Mobil Oil Company, Inc.; and Karel Charles Stiassni)

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October 1957

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BRIEF FOR AMICI CURIAE IN OPPOSITION

INTEREST OF AMICI CURIAE

Pursuant to Rule 42, and with the written consent of counsel for all parties, American Yugoslav Electric Company, Inc., Steven Ausnit, Walter Petschek, Socony Mobil Oil Company, Inc., and Karel Charles Stiassni, by their respective attorneys, respectfully submit this brief *amici curiae* in opposition to the petition for certiorari.

The *amici curiae* hold awards made by respondents Gillilland *et al,* constituting the Foreign Claims Settlement Commission, and certified to respondent Humphrey, Secretary of the Treasury, for payment from the Yugoslav Claims Fund in the U.S. Treasury pursuant to the International Claims Settlement Act of 1949. 64 Stat. 12,

67 Stat. 506, 22 U.S.C. §§1621-1627. Respondent Humphrey is "authorized and directed" to distribute the Fund, originally totaling $17,000,000, "only to" the holders of awards (or their successors in interest) certified by the Commission in the aggregate principal amount of $18,817,905. §§7(a), 7(c), 8(c). To date, respondent Humphrey has paid the full principal of the 229 awards of $1000 or less and 80% of the principal of the 647 awards exceeding $1000, leaving approximately $1,750,000 to be distributed to the awardholders.[1]

The two courts below ruled that Section 4(h) of the Act precludes petitioner's suit to set aside the Commission's award of $12,320 on its Yugoslav claim and to direct a second hearing or rehearing on the valuation thereof (R. 101; Pet. 1a). This Court has recently denied three petitions for certiorari in legally indistinguishable circumstances. *de Vegvar* v. *Gillilland,* No. 654 Oct. Term 1955; *Dayton* v. *Gillilland,* No. 129 present Term; *Haas* v. *Gillilland,* No. 352 present Term. Of the eight civil actions filed in 1955 by disappointed claimants against the Yugoslav Claims Fund, only the instant case remains pending in the courts.

Congress expressly precluded all such litigation because it "knew that if each claimant could take his claim to the courts the Fund could not safely be distributed until every last litigation had been terminated. Considerations of both domestic and foreign policy called for the prompt distribution of the Fund and the ending of disputes between Yugoslavia and the United States". *de Vegvar* v. *Gillilland,* 228 F.2d at 642. Even the prompt and full distribution of the entire Fund early in 1955, as envisaged by Congress, would have afforded only partial compensation to eligible U.S. nationals for the expropriations

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[1] *Settlement of Claims by the Foreign Claims Settlement Commission and its Predecessors.* (G.P.O. 1956) pp. 17-18, 303-330, 344; *Annual Report of the Secretary of the Treasury* (fiscal year ending June 30, 1956) p. 106.

of their property by Yugoslavia at the close of World War II. The pendency of suits by disappointed claimants such as petitioner, in the face of the statutory bar, has caused further losses by delaying payments to the holders of outstanding awards, the validity of which has never been questioned. The Fund was insufficient to pay any interest awarded by the Commission; and interest does not run on awards subsequent to certification or on the balances in the Fund in the U. S. Treasury. None of the litigants posted bonds to secure the awardholders against the substantial and continuing losses by delay since the inception of this and similar suits almost three years ago.

Denial of the instant petition would conclude this unwarranted and insubstantial litigation, and effectuate the Congressional directive that the entire Fund be distributed to the awardholders as certified by the Commission.

ARGUMENT

I

THE DECISION BELOW CORRECTLY APPLIED THE PLAIN LANGUAGE OF THE ACT PRECLUDING JUDICIAL REVIEW, AS PREVIOUSLY CONSTRUED IN SIMILAR CASES IN WHICH THIS COURT RECENTLY DENIED CERTIORARI.

The petition raises no constitutional issue (Pet. 2), and none was urged below, in the complaint (R. 6-8) or otherwise (R. 101-102; Pet. 5a-6a). The two courts below correctly ruled that jurisdiction over the subject matter was precluded by Section 4(h) of the Act as construed in *de Vegvar* v. *Gillilland*, 228 F.2d 640. This Court denied petitions for certiorari in that case (350 U.S. 994) and in *Dayton* and *Haas* (Nos. 129, 352 present Term) involving similar issues. Disappointed claimants argued there, as here, that the Foreign Claims Settlement Commission violated the Act in various respects and thereby denied "rights" allegedly afforded by Congress. The Court is re-

spectfully referred to the opposition briefs by respondents and by *amici curiae* in those cases.

The complaint and circumstances herein parallel those in *de Vegvar* and *Dayton* except in two immaterial respects:

First, the Commission awarded petitioner $12,320 (R. 65), whereas the Commission had denied altogether the Yugoslav claims presented by those other claimants. Section 4(h) obviously precludes review of the amount awarded. "The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact . . . and not subject to review . . . by any court".

Second, petitioner admittedly filed extensive documentary evidence on the validity and valuation of its claim (R. 3, 14-24, 68-70), and thereafter was accorded a hearing in which it adduced testimony and argued orally on both valuation and validity (R. 3-4, 33-54). The instant case therefore does not present the situations envisaged by petitioner (Pet. 2) or by the dissenting opinion below (Pet. 6a), where a claimant is denied a hearing or where valuation evidence tendered at a hearing is excluded. Petitioner actually seeks judicial review of the Commission's denial of its motion for a second hearing or rehearing on valuation (R. 5-8, 66). In *de Vegvar* and *Dayton*, review was held foreclosed on comparable matters concerning evidence at the hearing. The two courts below correctly held that their jurisdiction over the subject matter was precluded by the broad statutory prohibition in Section 4(h), *supra*.

Unlike the situation in such cases as *Peters* v. *Hobby*, 349 U.S. 331, petitioner does not question that the Commission had power to hear and decide its case. As in *de Vegvar* and *Dayton*, petitioner concedes that "pursuant to the provisions of the Act, the Commission was given jurisdiction to receive, examine, adjudicate, and render

final decisions with respect to claims of nationals of the United States included within the terms of the Yugoslav Claims Agreement" (R. 2). Essentially petitioner is presenting the same argument as in the petitions already denied by this Court; namely, that the Commission allegedly erred in exercising its admitted authority and should be ordered to re-exercise that authority in petitioner's favor (R. 7-8). See *Butte A. & P. Ry. Co.* v. *United States*, 290 U.S. 127, 141-142; *Lynch* v. *United States*, 292 U.S. 571, 587.

Petitioner's interpretation is also contradicted by the legislative history on this precise issue. The bill as introduced had contained all the present language in subsections (a), (b) and (h) of Section 4 giving finality to Commission action on Yugoslav claims and precluding judicial review. H.R. 4406, 81st Cong. 1st Sess. The House Committee on Foreign Affairs added an amendment providing that "The Commission shall comply with the provisions of the Administrative Procedure Act". But Congressman Vorys, who filed a minority report objecting to the denial of judicial review,[2] pointed out that this Committee amendment was "not for court review. The Committee turned that down". 95 Cong. Rec. 8844. Congressman Keating then offered an amendment to strike out Section 4(h) and thereby subject the Commission's proceedings to judicial review under the Administrative Procedure Act. *Id.* at 8853. The House rejected the Keating Amendment. *Id.* at 8855.[3] The Senate confirmed

[2] H. Rep. 770 pt. 2, 81st Cong. 1st Sess. pp. 1-2.

[3] In defeating this amendment, Congressman Ribicoff and other sponsors of the legislation reiterated the main considerations, noted in *de Vegvar*, supra, underlying the Congressional purpose in precluding review. 95 Cong. Rec. 8836-8840. Section 4 of the bill embodied the long-recognized Executive authority and discretion to determine with finality the validity and amount of international claims, particularly as expressed in *Z. & F. Assets Corp.* v. *Hull*, 311 U.S. 470. Above all, Congress wanted to avoid litigation delays, since otherwise "one claimant with one appeal could tie up the settlement of 1500 claims". 95 Cong. Rec. 8854.

this result by expressly excluding application of the Administrative Procedure Act where it was "otherwise specifically provided by this Act" (S. Rep. 800, 81st Cong. 1st Sess. p. 2), as in the preclusion of judicial review by Section 4(h). The Senate amendment was retained in the bill as enacted. §4(j).

Subsequent to the inception of this and similar suits recently before this Court, Congress reaffirmed the statutory bar to judicial review in extending the Act to approximately 10,000 claims against Bulgaria, Hungary, Italy, Rumania, and the Soviet Union. §314, Public Law 285, 84th Cong., 69 Stat. 562, 22 U.S.C. §1641m, approved August 9, 1955.

In other cases involving settlement of international claims, this Court has similarly barred review notwithstanding contentions that the commission had allegedly exceeded its authority by erroneous rulings in hearings, among other matters, in admitting certain new evidence, *Z. & F. Assets Corp.* v. *Hull,* 311 U.S. at 481-484, 488, 489, or in refusing to receive a liquidated claim or failing to obtain from the foreign government involved the evidence substantiating the claim in unliquidated form. *Meade* v. *United States,* 76 U.S. (9 Wall.) 691, 704-705, 718-725. See also *Endicott Johnson Co.* v. *Perkins,* 317 U.S. 501; *Overseas Airlines* v. *Civil Aeronautics Board,* 222 F.2d 303, 304 (D.C. Cir.); *Mario Mercado E Hijos* v. *Benson,* 231 F.2d 251, 252 (D.C. Cir.); *Nolde & Horst Co.* v. *Helvering,* 122 F.2d 41, 43 (D.C. Cir). Authorities relied upon by petitioner (Pet. 9-11) involved clearly distinguishable circumstances, such as coercive or regulatory administrative action affecting property rights or civil liberties, under statutes authorizing partial or full judicial review. So far as the instant case and statute are concerned, petitioner can prevail only by reversing *de*

Vegvar and *Dayton* and writing into Section 4(h) words which Congress deliberately excluded.[4] Petitioner's argument, if adopted, would flood the Federal courts with litigation concerning the settlement of claims against foreign governments, contrary to repeated precedents, traditional national policy, and express Congressional prohibition (Pet. 5a-6a).

Petitioner's suit also failed at the threshold because respondent Humphrey is under a statutory command to distribute the Fund "only" to the certified awardholders. §7(c); see *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121. The District Court had no jurisdiction to change the statutory plan. *Cf. District of Columbia* v. *Eslin*, 183 U.S. 62; *Bruner* v. *United States*, 343 U.S. 112. Petitioner conceded below that under the statutory arrangement, "one claimant was not permitted to object to an award made to another claimant" (R. 93). Awardholders such as petitioner, as well as other disappointed claimants, "must claim solely by virtue of their interest in the fund created by the statute and under its terms they are not entitled to complain of payments out of that fund of awards which [the Commission] has certified". *Z. & F. Assets Corp.* v. *Hull*, 311 U.S. at 489. The instant case is far stronger than *Z. & F. Assets*, where the statute did not expressly preclude review and the petitioners attacked the validity of the awards payment of which they sued to enjoin.[5]

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[4] *Cf.* the dissent below by Circuit Judge Miller (Pet. 8a), who also dissented in *de Vegvar* (228 F.2d at 643) and concurred in *Dayton* and *Haas* only on authority of that ruling. See *Haas* v. *Gilliland*, 246 F.2d at 684 (D.C. Cir.), *cert. denied*, No. 352 present Term.

[5] The courts below did not reach other applicable jurisdictional grounds for dismissing the complaint. Thus, petitioner failed to join the awardholders, whose interests in the Fund obviously render them indispensable parties. *Williams* v. *Bankhead*, 86 U.S. (19 Wall.) 563; *United States* v. *Bank of New York Co.*, 296 U.S. 463, 480. Also, the Commission's authority to take further action

II

PETITIONER WAS ACCORDED "A HEARING . . . WITH RESPECT TO SUCH CLAIM" AS PROVIDED BY THE ACT.

Assuming *arguendo* that the District Court had jurisdiction over the subject matter, the Commission committed no reversible error.

The hearing provisions of the Act [6] take their meaning

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on petitioner's Yugoslav claim expired on December 31, 1954. *Cf. United States* v. *Babcock*, 250 U.S. 328, 332; *Bruner* v. *United States*, *supra*. The four-year deadline in the original Act had been inserted by the House Committee "as a stimulus to efficient performance and as an indication of the purpose of this legislation to bring about a settlement and to avoid any unnecessary deferment of the time when claimants will receive the measure of redress to which they are entitled". H.Rep. 770, 81st Cong. 1st Sess. p. 6. In 1953, Congress extended the termination date to December 31, 1954, in conjunction with increased authorizations for administrative expenses of the Commission and reorganization of its personnel and operations. 67 Stat. 506; H.Rep. 1021, 83rd Cong. 1st Sess. pp. 1-3. The Executive message accompanying the reorganization plan which re-constituted the Commission in 1954 recognized that "Under the act, settlement of the remaining Yugoslav claims must be completed by December 31, 1954." H.Doc. 381, 83d Cong. 2d Sess. p. 2.

[6] "Sec. 4 . . . (b) . . . All decisions shall be upon such evidence and written legal contentions as may be presented within such period as may be prescribed therefor by the Commission, and upon the results of any independent investigation of cases which the Commission may deem it advisable to make. Each decision by the Commission pursuant to this Act shall be by majority vote, and shall state the reason for such decision, and shall constitute a full and final disposition of the case in which the decision is rendered." . . .

. . . . "(h) The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to

from the function of the Commission under the statutory plan as a whole. Prior to the hearing on the proposed decision herein, the Commission followed the time-honored procedure in claims settlement, recognized in the Administrative Procedure Act, that "In . . . determining claims for money or benefits . . . any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form". §7(c), 60 Stat. 241, 5 U.S.C. §1006(c). At various times in the period 1951-1954, prior to the hearing, petitioner submitted numerous financial statements and other documents concerning the valuation and other phases of its claim for stock in an Italian corporation acquired in 1945 (R. 3, 14-24, 68-70, 75). Stripped of legal conclusions and self-contradiction, petitioner's supporting affidavit shows that Commission officials advised petitioner on October 5, 1954 (R. 73), and again on November 10, 1954 (R. 75-76), that the valuation of the claim remained to be determined even if the claim was held to be eligible. The Commission also repeatedly advised petitioner of its program and purpose to carry out the Congressional direction to conclude settlement of this and all other Yugoslav claims by December 31, 1954 (R. 71, 73-74). *Supra* note 5.

On November 26, 1954, the Commission issued its proposed decision, which reviewed various documents concerning petitioner's acquisition of the stock and the credit (in Italian Lire) stressed by petitioner (R. 13-29), and concluded that the entire claim was ineligible on equitable and legal grounds (R. 29-30). Petitioner there-

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such claim. The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise".

upon filed objections and a brief; assigned errors as to law and evidence (R. 31-32); and stated that "A hearing is requested on . . . such claim for the taking of evidence and for the hearing of oral argument" (R. 31). The Commission advised petitioner that "the hearing which was requested" on the claim was scheduled for December 22, 1954 (R. 33).

At the scheduled hearing, the Commission's examiner and its counsel stated in substance that another Commission employee had submitted a memorandum suggesting that the claim should be given only a "nominal" value because of the outstanding liabilities of the Italian corporation; and the examiner urged petitioner to submit any further available evidence bearing on valuation, for consideration in the event the Commission reversed the proposed decision (R. 36-39). Thereupon petitioner's counsel stated that "We were faced with a very similar statement by the Hearing Examiner in another case about ten days ago" (R. 37); and that petitioner reiterated the argument previously made, that it was "powerless to meet any view that the Commission may have" on valuation, since it had not been advised of the Commission's "position" thereon. *Id.* The examiner replied that the Commission had not yet made any determination on value, and that it was not customary "in connection with a decision which denies a claim, to indicate what the value would have been if there hadn't been a denial" (R. 39). The examiner noted for the record petitioner's request for a further hearing on valuation if the Commission reversed the proposed decision, unless the Commission awarded the full amount claimed (R. 41-43).

Notwithstanding these protestations, when the hearing proceeded petitioner adduced detailed valuation testimony by its president and principal stockholder, who had negotiated acquisition of the stock and the credit and showed precise knowledge of the entire transaction and the valuations pressed by petitioner (R. 43-52). Petitioner's counsel also argued orally on valuation (R. 52-54).

In the hearing, petitioner really sought an advance ruling on valuation, which the Commission had not yet determined and which the Act required only if the claim had been "approved" in the proposed decision. *Supra* note 6. The Commission's procedure followed the requirements of Section 4(h) and indeed confirmed the practice, of which petitioner evidently had had some prior notice, to receive additional evidence on valuation where a proposed decision denies a claim altogether.

The Commission's final decision held the claim to be eligible, and awarded petitioner $12,320 (R. 58-65). The final decision shows on its face (R. 60-62) that the Commission had before it and considered the various substantial valuations of fixed assets urged by petitioner (R. 6) and reiterated in its second request for rehearing (R. 81-83). The Commission determined the net worth of the stock—$1 per share—from petitioner's records (R. 61-64, 69), which were filed by petitioner prior to the hearing and were relied upon in its testimony (R. 45-46). The record and findings particularly reveal that petitioner, which claims $1,500,000, was out-of-pocket only the $20,000 down-payment made on September 28, 1945 (R. 13-16, 46-48). Yugoslav seizure of the factory in April 1946 effectively prevented transfer of possession to petitioner, upon which event further payments totaling $930,600 were expressly conditioned, according to petitioner's version and evaluation of the transaction (R. 16, 25, 46, 60).[7]

The language of Section 4(h) shows that Congress foresaw the various eventualities in proceeding from pro-

[7] According to petitioner's documents, a balance of $930,600 was payable to the sellers "six months after [petitioner] shall have taken possession of the factory" (R. 16). In April 1946, before petitioner could take possession, Yugoslav authorities barred the sellers from access to the factory premises (R. 25, 60). In the record of the four-year proceeding before the Commission, petitioner never established that it had obtained possession or paid any part of the balance conditioned thereon. *Id.*

posed to final decision on any claim, and specified that "a hearing . . . with respect to such claim" should be dispositive. "Upon such hearing", the statute clearly provides, "the Commission may affirm, modify or revise" its proposed decision.[8] In framing its final decision, the Commission clearly retained and exercised its full authority to determine both validity and valuation. If final decisions were limited to the issues in proposed decisions, each proceeding would be hopelessly complicated and extended by successive hearings on successive issues.

Contrary to petitioner's present argument that the statutory proceedings were "adversary" trials (Pet. 13-14), petitioner acknowledged below that "to avoid endless litigation, the Commission was supposed to take both the favorable and adverse position in considering all claims" (R. 93). Petitioner had the burden of proof on the valuation as well as the validity of its claim throughout the long period of claims settlement before the Commission.[9] Unquestionably petitioner was on notice that its claimed valuation was in issue in the concluding weeks of the proceeding and at the scheduled hearing; and petitioner actually adduced testimony and argued orally on the valuation of its claim at the scheduled hearing. Petitioner's objection "narrows down to mere cavilling."

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[8] In accord, see *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 439-440; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 581-583; *United States* v. *Wrightwood Dairy Co.*, 127 F.2d 907, 910 (7th Cir.); *Herd* v. *Folsom*, 231 F.2d 276, 278 (7th Cir.); *Interstate Power Co. et al* v. *Federal Power Commission*, 236 F.2d 372, 385 (8th Cir.), *cert. denied* 352 U.S. 967; Administrative Procedure Act § 8(a), 60 Stat. 242, 5 U.S.C. § 1007(a).

[9] ". . . the claimant shall be the moving party, and shall have the burden of proof on all issues involved in the determination of its claim". Rules of Practice and Procedure § 300.6(d), 22 CFR 300, 18 F.R. 6966. Substantially identical language had been included in the Commission's Regulations since 1950. *Settlement of Claims, op. cit. supra*, at 190, 260, 269, 291. See also Administrative Procedure Act § 7(c), 60 Stat. 241, 5 U.S.C. § 1006(c).

Witmer v. *United States*, 348 U.S. 375, 383-384. See also *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 427-428; *Market Street Railway* v. *Railroad Commission*, 324 U.S. 548, 558-559; *National Labor Relations Board* v. *Mackay Co.*, 304 U.S. 333, 349-351; *City of Dallas* v. *Civil Aeronautics Board*, 221 F.2d 501, 505-506 (D.C. Cir.), *cert. denied* 348 U.S. 914.

In the actual circumstances herein, "the basis for a judgment is here in the record". *Market Street Railway* v. *Railroad Commission*, 324 U.S. at 560. Petitioner stresses the Commission's refusal to produce an intra-agency memorandum prepared by its own expert employee (R. 4). District Judge Curran denied petitioner's application to examine this memorandum (R. 55-56, 104), and District Judge Wilkin declined to disturb that ruling (R. 99). Long-standing precedents bar petitioner's efforts thus "to probe the mental processes" of the Commission. *Morgan* v. *United States*, 313 U.S. 409, 422; *Chicago R.R. Co.* v. *Babcock*, 204 U.S. 585, 593. The memorandum reflected only intra-agency staff analysis not binding on the Commission, and was "in the nature of argument or opinion" rather than "evidential facts". *Market Street Railway* v. *Railroad Commission*, 324 U.S. at 559-560.

Considering the record as a whole and the function of the Act, there is ample support for the Commission's findings and informed judgment (R. 66) that petitioner was accorded "a hearing . . . with respect to such claim", and was not entitled to a second hearing or rehearing on valuation. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 535-536; *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572, 579-581. Since the Commission complied with the Act, summary judgment for respondents was properly entered below.

CONCLUSION

The decision below follows the clear mandate of Congress and the applicable precedents of this Court. On the record herein, the hearing and valuation given petitioner's claim by the Foreign Claims Settlement Commission present no issue of general importance or other substantial basis for review by writ of certiorari. Denial of the petition would remove the last obstacle to complete distribution of the Fund to the awardholders as directed by Congress.

Respectfully submitted.

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